Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD J. McLAMB, PETITIONER

v.

STATE OF ARIZONA, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court for the State of Arizona

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PETITION FOR A WRIT OF CERTIORARI

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55 pp

1. Does a criminal conviction for wearing a policeman's patch at a public gun show booth violate PETITIONER'S First Amendment right of political free speech, where PETITIONER, a retired/disabled policeman, wore the patch as part of his political protest of federal gun policies?

2. Is the Phoenix City Code Section which prohibits the unauthorized wearing of police insignia void for vagueness on its face or as applied to PETITIONER'S political protest?

3. Was the criminal prosecution against PETITIONER selective and discriminatory, in violation of PETITIONER'S First Amendment political protest and Fifth and Fourteenth Amendment due process and equal protection rights, where PETITIONER had a long history of political protest and litigation with the Phoenix Police Department and was the first ever prosecuted under the subject Phoenix City ordinance?

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PETITION FOR WRIT OF CERTIORARI

The PETITIONER, GERALD J. McLAMB (PETITIONER), respectfully requests that a Writ of Certiorari be issued to review the judgment of the Arizona Supreme Court and the Arizona Court of Appeals; the Arizona Supreme Court refused to review the judgment and opinion of the Arizona Court of Appeals.

OPINION BELOW

State of Arizona v. Gerald McLamb, Arizona Supreme Court No. CR-96-0624-PR, unpublished decision filed February 26, 1997, refusal to review the opinion of the Arizona Court of Appeals, Appendix A. State of Arizona v. Gerald McLamb, 932 P.2d 266 (AZ App. 1996), opinion filed September 17, 1996, Appendix B.

JURISDICTION

On February 26, 1997, the Arizona Supreme Court refused to review the judgment and opinion of the Arizona Court of Appeals (Division One). This petition is timely pursuant to Rule 13 of this court: postmarked by First Class Mail no later than 90 days from February 26, 1997. This court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law at issue are the United States Constitution, First Amendment - free speech, peaceful assembly, association, and petition for redress of grievances; the Fifth Amendment and Fourteenth Amendment -

right to due process of law and equal protection under the law, respectively (free from prosecution of vague statutes and from selective and discriminatory prosecution) and the Phoenix City Code § 23-21.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process f law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Phoenix City Code § 23-21 provides:

> Wearing Badges or Insignia of Officials.
> It shall be unlawful for any person to wear a firemen's or policemen's badge or insignia, or insignia of any public officer or inspector of the City when not properly authorized to wear such badge or insignia.

STATEMENT OF THE CASE

I. PROCEDURE

On December 12, 1993, PETITIONER, a retired/disabled Phoenix, Arizona police officer, engaged in political protest by operating a booth at a gun show in Phoenix. To gain attention to his cause

and as an important and theatrical part of his political protest, PETITIONER wore a police officer uniform, including Phoenix Police Department shoulder patches for which he was prosecuted by the city for impersonating a police officer, for which he was acquitted, and for wearing the insignia, for which he was convicted in Phoenix Municipal Court under Phoenix Code Section 23-21. The conviction was affirmed by the Maricopa County Superior Court and by written opinion by the Arizona Court of Appeals, Division I on September 17, 1996. On February 26, 1997, the Arizona Supreme Court refused to review the judgment and decision of the Arizona Court of Appeals.

Under Rule 10 of this Court's Rules, PETITIONER has filed this petition because the Arizona Court of last resort has decided an important federal question in a way that conflicts with relevant decisions of this court regarding First Amendment protection of political protest, including wearing of military or police uniform insignias and other symbols, and flag desecration cases. See especially, Schacht v. U.S., 398 US 58 (1970)(army uniform worn in protest of Vietnam War; First Amendment protection).

II. OVERVIEW OF THE FACTS

PETITIONER, nationally known[1] for

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[1] As PETITIONER testified at trial, PETITIONER and Army Colonel (retired) BO GRITZ were successful in convincing RANDY WEAVER to surrender to FBI agents who had shot and killed his wife (in a doorway as she held her infant daughter) and fourteen year old son (in the back). The incident

protest of government policies and procedures, especially those dealing with the right to bear arms, has a long history of political protest and dispute/litigation with the Phoenix Police Department. For example, prior to his disability retirement in 1986, PETITIONER published a newsletter "Aid and Abet" directed to law enforcement officers, which newsletter expressed a purpose of "educating [law enforcement officers] concerning constitutional issues." PETITIONER was fired by the department for his refusal to obey an order to turn over his newsletter mailing list. PETITIONER claimed violation of his First Amendment rights and was reinstated by an appeals board. In 1993, PETITIONER helped form an organization called "Police Against the New World Order," and during the subject gun show he hung booth banners declaring "Police Against the New World Order," "Please Support Your Right To Bear Arms," and "We Will Not Take Your Guns Away."

As part of his political protest, PETITIONER wore what he called his "retirement uniform" which consisted of a PPD shirt on which he wore shoulder patches with the official department insignia. At the gun show, PETITIONER distributed his "Aid and Abet" newsletter and advertised the sale of his manual entitled "Operation Vampire Killer 2000."

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and PETITIONER'S role received nation-wide attention.

III. CHRONOLOGY

A. Protected Activities At The Gun Show

PETITIONER made political speeches in a booth at a gun show on Saturday and Sunday, December 11 and 12, 1993. His speech also included pamphlets, banners, and symbols. Among his pamphlets were newsletters that discussed the experiences and opinions of policemen (active and retired) who support the ordinary citizen's rights to keep and bear arms. Implicit in these political statements was a protest against all police departments and officials who advocate disarming non-police or non-military citizens.

Symbols that are central to this appeal were displayed by PETITIONER. He wore a dark blue shirt that had been part of his uniform when he was an active duty policeman with the Phoenix Police Department (DEPARTMENT). Disabled in the line of duty, he retired from the Department in 1986. On each shoulder of the shirt was a patch that contained the current official DEPARTMENT insignia. Above the left chest pocket was a "flat" badge indicating that PETITIONER was a retired policeman. He had received the badge upon his retirement from the DEPARTMENT. Other symbols on the shirt included a button containing the words "Question Authority," another button containing the words "POW/MIA", and a whistle of the type often carried by motorcycle officers. Defense Exhibit 1, State's Exhibits 1-4, Tr. 57 et seq.

LUNDBERG), Tr. 300 et seq. (PETITIONER).[2]

Two off-duty Phoenix police officers, ROBERTS and GUZMAN, came by PETITIONER'S booth at the gun show on Saturday, December 11. Tr. 462 et seq. They wondered between themselves whether it was legal for PETITIONER to be wearing the apparel, although they were not aware of a city ordinance or DEPARTMENT policy addressing the matter. Later, Officer ROBERTS called his precinct office (the Central City precinct), spoke to Lieutenant JOHN HUMPHREY and Sergeant PATRICK MELVIN, and described what he had seen at the gun show. Sgt. MELVIN made a written notation of the conversation and also discussed the subject with Lieutenant JOHN HUMPHREY. Tr. 468 et seq.

The next morning Lt. HUMPHREY told Sergeant TED MUSIC that there was a person at a gun show either impersonating an officer or wearing a Phoenix police officer's uniform. Tr. 446 et seq. Lt. HUMPHREY directed Sgt. MUSIC to accompany him to police headquarters to discuss the matter with the duty chief, Assistant Chief BREWSTER. In their meeting, Chief BREWSTER explained that he had already received a report of the matter. Then he handed a memorandum to Lt. HUMPHREY and Sgt. MUSIC. Chief BREWSTER also indicated that he had already discussed the matter with the city legal staff, and, upon that basis, directed Sgt. MUSIC to enforce the city ordinance. Tr. 453. Interestingly, this was the only occasion that Sgt. MUSIC had ever met with a duty chief to discuss enforcing the city

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[2]Reference to the Court Reporter's Transcript of Proceedings.

ordinance regulating wearing police insignia. Tr. 451.

On the way out of police headquarters, Sgt. MUSIC encountered Officer DAVID LUNDBERG, whom Sgt. MUSIC directed to accompany him to the gun show. Tr. 453. Upon arrival at the show, Sgt. MUSIC asked a person in charge of the show if PETITIONER was present, whereupon he learned that PETITIONER was present in a booth. Tr. 459. Obviously, Sgt. MUSIC knew PETITIONER and anticipated PETITIONER was the person he was seeking.

Sgt. MUSIC and Officer LUNDBERG approached PETITIONER at his booth. Tr. 93. Sgt. MUSIC then ordered PETITIONER to remove the shirt containing the political symbols. Tr. 95, 440, 454. When PETITIONER refused on First Amendment grounds, Sgt. MUSIC directed Officer Lundberg to issue two citations to PETITIONER for violating another code section (impersonating a police officer) and 23-21 (wearing Phoenix police patches). Tr. 96-97. Officer LUNDBERG then issued PETITIONER the citations that formed the original complaint in this case.

B. Procedural Setting

During the pre-trial stages, the charge of violating City Code § 23-20 was dismissed and replaced with a charge of violating state law, A.R.S. 13-2406, impersonating a police officer. Tr. 77. The trial testimony was replete with evidence that PETITIONER was presenting himself as a retired Phoenix Police officer espousing political views of his own and other like-minded persons, not necessarily those of any police officer

or other organization. See, e.g. testimony of Sgt. MUSIC, Tr. 101-103, Officer R. GARRABRANTS, Tr. 224, et seq., R. DALTON, Tr. 196-200, and T. HUEBNER, Tr. 210-212. The trial court found that PETITIONER was not guilty of the charge of violating A.R.S § 12-2406. Tr. 417. However, the trial court ruled that PETITIONER had violated City Code § 23-21 by wearing the police patches on the shirt shoulders. Tr. 419. The court imposed a fine of $79. Tr. 555. Subsequently, the court granted PETITIONER an evidentiary hearing on his pre-trial motion to dismiss for selective and discriminatory prosecution. Tr. 420. After the evidentiary hearing the trial court denied PETITIONER'S motion. Tr. 553.

REASONS FOR GRANTING THE PETITION

I. THE ARIZONA COURT OF APPEALS ERRED WHEN IT HELD THE CONVICTION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHTS; EXPRESSIVE POLITICAL CONDUCT IS ENTITLED TO FULL CONSTITUTIONAL PROTECTION.

A. The Court of Appeals Decision

The Court of Appeals, at page 14 of its Opinion, recognized that, "(w)earing an official Phoenix Police Department insignia in the context in which the defendant was wearing it was expressive conduct." Despite this acknowledgement, the Court went on to state that, "the ordinance is not related to the suppression of free expression." This paradoxical conclusion is simply not borne out by the facts: PETITIONER'S free expression was suppressed when he

was cited for no other reason than engaging in free expression. Incredibly, the Court of Appeals placed its imprimatur on an ordinance that completely prohibits admittedly expressive conduct. The First Amendment protections at issue here: (1) free (political/symbolic) speech; (2) peaceful assembly (a gun show); (3) association (gun show displayers and attendees); and (4) petition for redress of grievances ("Police Against the New World Order").

B. The First Amendment Protects Wearing of Military Uniform as Part of Vietnam War Protest

First, PETITIONER respectfully directs the court's attention to Schacht v. U.S., 398 U.S. 58 (1970), a case of special pertinence to the present matter. In Schacht, the defendant wore a U.S. military uniform in a skit performed in front of an armed services induction center. The skit, a protest against U.S. involvement in Vietnam, represented U.S. soldiers killing a pregnant Vietnamese woman. Unauthorized wearing of U.S. military uniforms was prohibited by a federal statute, although there was an exception for wearing them in theatrical productions that did not discredit the armed forces. This Court found that the informal skit was a theatrical production within the meaning of the statute, striking down the proviso that the production not discredit the armed forces as an impermissible restraint on free speech in violation of the First Amendment.

Thus, under the Arizona courts' view, had PETITIONER worn the uniform and patches as part of a satirical skit in

the streets of downtown Phoenix, as opposed to a public gun show booth, PETITIONER would receive no protection from the First Amendment or this court. All of this despite this court's holding in Schacht decided over 25 years ago. And PETITIONER repeatedly relied upon Schact, beginning with his Motion to Dismiss on First Amendment grounds filed with the trial court.

C. The First Amendment Protects Symbols and Protest Activities

This Court has long recognized that the First Amendment forbids the abridgement of not only spoken and written speech, but of conduct or symbolic speech which poses sufficient communicative elements to convey a particularized message to the public. The notion that the First Amendment protects symbolic speech has been recognized by this Court as early as 1931. In Stromberg v. California, 283 U.S. 359 (1931), this Court applied First Amendment protection to displaying a red flag. Twelve years later, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), this Court, recognizing the expressive nature of certain actions, held that public school children could not be compelled to salute an American flag. Then, again in Brown v. Louisiana, 383 U.S. 131 (1966), this Court emphasized that First Amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest...unconstitutional segregation of public facilities." *Id.* at 142 (footnote

omitted). In Brown, this Court prohibited state punishment of black students for peaceful sit-ins in a segregated library.

D. The First Amendment Protects American Flag Desecration

In Street v. New York, 394 U.S. 576 (1969), this Court overturned the conviction of Street, who had burned a personally-owned flag while casting aspersions toward it on a street corner in New York. The Court avoided addressing the symbolic speech aspects of the case by resting its decision on the First Amendment protection afforded verbal expression, and because the record made it possible to conclude that Street was convicted on the basis of his words alone.

In Spence v. Washington, 418 U.S. 405 (1974), the defendant was convicted under the "improper use" provision of the state's flag desecration statute. Spence had affixed certain symbols to a personally-owned flag and displayed the flag upside down in the window of his apartment. This Court looked at not only the physical acts but also at the context in which the acts occurred. Then, finding from the context that Spence was both intending and likely to communicate a message, this Court looked at the state statute under which he was convicted and the state interest furthered by that statute. Spence's conviction was overturned because the statute infringed protected speech activities.

The Court overturned another flag desecration conviction in Smith v. Goguen, 418 U.S. 566 (1974), but avoided the symbolic speech aspect of the case. Rather, the Court struck the statute on

the basis that it was void for vagueness. The defendant, Spence, wore a small flag sewn to the seat of his trousers and was convicted under a Massachusetts flag misuse statute which made it a crime if one "publicly. . .treats contemptuously" the United States flag. *Id.* at 568.

In Texas v. Johnson, 492 U.S. 397 (1989), this Court stated that, if a statute was found to be related to expression, the Court would carefully probe to ensure compliance with constitutional requirements. Johnson, 429 U.S. at 402. A statute or regulation related to expression will be subjected to the "most exacting scrutiny." Johnson, 492 U.S. at 412.

In Johnson, the defendant was convicted of violating Texas' flag desecration statute because he unfurled a U.S. flag, doused it with kerosene, and set it afire as protestors chanted pejoratives toward the flag. The flag burning demonstration coincided with the 1984 Republican National Convention. As the Court pointed out, Johnson was not charged with stealing a flag, destroying someone else's property, trespass, disorderly conduct, or arson. Flag desecration, in this context, was burning the flag with an improper motive.

The Court examined Johnson's conduct to determine whether it was expressive, i.e., whether the conduct possessed sufficient communicative elements to bring the First Amendment into play. As its test, the Court looked at (1) whether there was an intent to convey a particularized message; (2) whether there was a significant likelihood that the message would be understood by those who viewed it; and (3) the context in which the conduct occurred. Johnson, 492 U.S.

at 404. The Court found that Johnson's flag-burning expressive conduct required First Amendment analysis.

Next, the Court looked to determine whether the state's regulation was related to expression. Johnson, 492 U.S. at 402. Texas argued that it had an important interest in protecting the flag as a symbol of nationhood and national unity. The Court found that the interest in protecting a symbol is indeed an interest in protecting the message conveyed by the symbol, which is a regulation related to expression. 492 U.S. at 409-410. Finally, after subjecting the statute to the "most exacting scrutiny," the Court overturned Johnson's conviction as violative of the First Amendment.

After Johnson, Congress passed the federal Flag Protection Act of 1989,[3] attempting to avoid the impact of that case by using more content-neutral terms. However, the content-neutral terms did not change the fact that the statute was attempting to regulate the meaning of a symbol. Further, the statute did not proscribe disposing of a flag when it became worn or soiled. Thus the statute was related to expression, and its broad scope reached free speech activities. For all these reasons, the Court overturned convictions brought under the Statute in United States v. Eichman, 496 U.S. 310 (1990).

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[3]103 Stat. 777, 18 U.S.C. § 700(a)(2)(Supp.1990)

E. The First Amendment Protects Wearing of Uniforms and Symbols

Even before Texas v. Johnson, lower federal and state courts had ruled regulations unconstitutional where they attempted to prohibit wearing of uniforms and emblems. The wearing of uniforms was upheld as symbolic expression protected by the First Amendment.

In a group of related cases, the National Socialist Party of America ("NSPA") planned to conduct a march in Skokie, Illinois, a suburb of Chicago with a large Jewish population. The marchers were planning to wear a uniform similar to the uniform worn by soldiers of the Third Reich, including an armband displaying a swastika. When NSPA announced its plans, Skokie officials obtained an injunction in state court to prevent the march. After the state courts refused to stay the injunction pending appeal, this Court ordered a stay. National Socialist Party of America v. Village of Skokie (NSPA), 432 U.S. 43 (1977). On appeal, the state appellate court ruled that the wearing of the uniform was a protected free speech right and could not be prohibited by injunction; but the wearing of the swastika was so offensive that it could be prohibited. NSPA, 51 Ill. App 3d 279, 366 N.E.2d 347 (1977). The state supreme court, however struck the entire injunction, holding that it violated the marchers' freedom of speech. The marchers were entitled to wear both the uniforms and the swastikas. NSPA, 69 Ill. 2d 605, 373 N.E.2d 31 (1978).

During pendency of the injunction appeals, the Village of Skokie adopted three ordinances to cover future marches.

One of the ordinances required permits for marches. A second ordinance prohibited display of clothing of symbolic significance that incites hatred. And a third prohibited public demonstrations by members of political parties while wearing "military-style" uniforms. Violation of the ordinances was punishable as a criminal offence. When the NSPA's application for a permit to march was denied, the NSPA sought injunctive and declaratory relief in federal court. The federal district court found the uniform ordinance "patently and flagrantly unconstitutional," citing Washington, supra., Tinker, supra., and Stromberg, supra. Collin v. Smith, 447 F.Supp. 676,700 (1978). On appeal by Skokie, the Seventh Circuit affirmed the district court's holding. 578 F.2d 1197 (7th Cir. 1978).

In a different context, the California Court of Appeals held that wearing the insignia of a motorcycle gang was an exercise of free speech. Renteria v. Dirty Dan's Inc., 198 Cal. App. 1447, 244 Cal. Rptr. 423 (1988). The court ruled, therefore, that it was a violation of a California anti-discrimination ordinance for Dirty Dan's night club to refuse service based on the fact that a person was wearing a motorcycle gang insignia.

II. THE ARIZONA COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT THE SUBJECT CODE IS NOT VOID FOR VAGUENESS OR OVER BROAD.

A statute which either forbids or requires doing an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Planned Parenthood of Central and Northern Arizona v. State of Arizona., 537 F.Supp 90, rev'd 718 F.2d 938, appeal following remand 789 F. 2d 1348, cross-appeal dismissed 107 S.Ct. 391, affirmed Babbit v. Planned Parenthood of Central and Northern Arizona, 107 S.Ct. 391, 479 U.S. 925, 93 L.Ed. 2d 346 (1982)(suit challenging vague language in appropriations bill).

The Arizona Court of Appeals stated that PETITIONER has no quarrel with the term "insignia," as that word is used in Code Section 23-21. Whether the Court's conclusion is entirely accurate as regards the PETITIONER'S fundamental void-for-vagueness argument, the Court went on to acknowledge PETITIONER'S assertion that the word "authorized," as used in the same section, is unconstitutionally vague. Ironically, in rejecting this argument and abruptly concluding that "its meaning is clear," the Court of Appeals relied on the Oxford English Dictionary, a scholarly, even recondite, work that most "men of common intelligence" do not even know exists.

At trial, PETITIONER testified that he "knew the regulations pretty well, the aps [special] orders and all, and I wasn't given any [instructions with respect to a retired officer wearing a shirt bearing police patches], nor have I been able to find any in any of the various manuals and everything that the [Phoenix Police] department issues to regular officers." Tr. 287. Indeed, when asked whether, to PETITIONER'S knowledge, there existed any "regulations, statutes, general orders, any authoritative

statements whatsoever," regulating what a retired Phoenix Police officer may or may not wear, PETITIONER replied, "there are none." Tr. 287-288. That PETITIONER was reduced to questioning as to whether he was "authorized" to display official police patches is scarcely to be wondered at.

When PETITIONER retired from the Phoenix Police Department in 1986, an official Phoenix Police badge was presented to him. Tr. 330. For some bizarre reason, PETITIONER'S possession and subsequent display of his official police badge was apparently "authorized" by the Phoenix Police Department, while his display of police patches was not. Small wonder that PETITIONER, a man of at least common intelligence, didn't understand whether wearing his "retirement uniform" was "authorized." His confusion in this regard was evident at trial when he testified that he "was never notified and didn't believe they [i.e., other retired police officers] were either, because I can't find anyone that was ever told what they should or should not do with that badge or uniform." Tr. 302. Despite the Court of Appeals' conclusion that "the defendant understood the word ["authorized"]," PETITIONER unequivocally testified at trial that, "I don't know if I understand the word authority." Tr. 300. Given the circumstances, who could blame him?

The Arizona Court of Appeals' observation that the word "authorize" is utilized in many criminal statutes is neither here nor there. The proper focus of inquiry is a common man's understanding of <u>this</u> ordinance, not of a hodge-podge of unrelated statutes.

The Arizona Court of Appeals, by

what amounted to little more that fiat, held that Code Section 23-21 is not void for vagueness. In so doing it erred, since its sweeping use of terms like "insignia" and "authorized" invite confusion, guesswork and, ultimately, anarchy.

Sabelko v. City of Phoenix, 846 F.Supp. 810 (D.Ariz 1994), provides a good example of a constitutional analysis of a Phoenix ordinance that was ostensibly "content neutral." The ordinance attempted to regulate demonstrations at abortion clinics. The court found the ordinance over broad, not narrowly tailored, vague, and that it vested unrestrained discretion in private citizens to restrict First Amendment Expression.

III. THE SUBJECT CODE WAS SELECTIVELY, AND UNCONSTITUTIONALLY, ENFORCED AGAINST PETITIONER, WHERE PETITIONER, A RETIRED/DISABLED POLICE OFFICER, WAS THE FIRST PERSON PROSECUTED AND HAD A HISTORY OF POLITICAL PROTEST AND LITIGATION WITH THE POLICE DEPARTMENT

The Fourteenth Amendment to the Constitution operates to prohibit arbitrary discrimination by the states against persons or classes in criminal cases. An individual's right to due process of law and to equal protection may be violated by the discriminatory administration of a law that is impartial on its face. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)(discriminatory application of laundry ordinance).

In addition to the facts that occurred at the gun show on December 11

and 12, 1994 (discussed above), testimony at the trial established that the wearing of the official Phoenix police insignia is fairly common in Phoenix and § 23-21 is rarely enforced. For example, Phoenix police officer RALPH GARRABRANTS testified that it was not unusual to see non-police wearing official insignia of the Department on T-shirts and other apparel. He personally witnessed a policeman's girlfriend wearing such insignia on a T-shirt, but he did not enforce City Code § 23-21. Tr. 224 et seq. Similarly, Sgt. MELVIN testified that he had encountered a person wearing the official patch of the DEPARTMENT, and he simply told the subject to go home with the apparel. Tr. 473-474.

Similarly, the testimony established that the wearing of the official Phoenix Fire Department insignia (equally prohibited by § 23-21) is fairly common in Phoenix and enforced even less than the prohibition against wearing police insignia. For example, Fire Department Captain MARK GODFREY testified that ex-battalion chiefs, no longer on official duty, wear with impunity their battalion chief jackets which have the official Phoenix Fire Department insignia on them. Tr. 246-248.

Phoenix Police Sgt. MUSIC testified at trial that it was not uncommon for citizens to be seen wearing police insignia, although he had enforced City Code § 23-21 on at least one proper occasion, but he had allowed the charged party to remove the police patches from the shirt rather than removing the entire shirt. Tr. 455-456. Sgt. MUSIC did not give PETITIONER that same option. Nor did Sgt. MUSIC give PETITIONER the option of covering up the patches. Tr. 104-108.

It appears, based upon the City's records, that PETITIONER is the only person who was ever prosecuted for violating City Code § 23-21. The disparity between enforcement of § 23-21 is explained by the motive of the Department against the content of PETITIONER'S political speeches. This motive was established by the testimony of the police officers themselves. Officer LUNDBERG testified that he was concerned that PETITIONER may be perceived as representing the views of the Department. Tr. 73. Likewise, Sgt. MUSIC testified that he was concerned that the public may believe that the Department supported PETITIONER'S view that the police supported their right to keep and bear arms. Tr. 112-113.

Unfortunately, this motive against PETITIONER'S views and his First Amendment expression did not begin with the December 11-12, 1993 gun show. During his tenure as a police officer PETITIONER began writing a political newsletter to policemen. The assistant Chief of Police told PETITIONER that certain police officials did not support the contents of the newsletter. Furthermore the assistant chief ordered PETITIONER to turn over the newsletter's mailing list. When PETITIONER refused on his First Amendment grounds, the assistant chief fired PETITIONER. However, on appeal to the Civil Service Board, PETITIONER was reinstated with full back pay, and the Police Department was admonished to stop the vendetta against PETITIONER and his First Amendment activities. PETITIONER was fired the second time by Chief DENNIS GARRETT, who was Chief of Police at the time of the December 12, 1993 arrest. Tr.

509-512.

CONCLUSION

This is a case bearing important First Amendment/political protest implications in which, PETITIONER, a political protester of national renown, has been:

1. Prosecuted for the use of a symbol as part of his political protest;

2. Prosecuted under a statute which, at best, is vague in its application to PETITIONER, a former police officer entitled to wear his "retirement badge";

3. Selectively and discriminately prosecuted for exercise of his First Amendment right for political protest and to petition the government for redress of grievances by his appeal of his discharge from the police department for exercise of his First Amendment rights.

PETITIONER requests that the court review his case as one of constitutional importance which affects all of those within the borders of the Unites States who dare exercise their First Amendment rights to protest government policies by thought, word or deed, including the wearing of military or police uniforms for purpose of theatrics, attention, emphasis, or mocking the subject of the protest.

Respectfully submitted this 27th day of May, 1997.

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